98-1170 (9)

SUPREME COURT OF THE UNITED STATES

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LEONARD PORTUONDO, Superintendent of Fishkill Correctional Facility,

Petitioner,

-against-

RAY AGARD,

Respondent.

----------X

October Term 1998
Case No. 98-1170

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

PLEASE TAKE NOTICE that respondent Ray Agard, by his attorney, Beverly Van Ness, Esq., respectfully moves for leave to proceed in forma pauperis in connection with the above-captioned petition for certiorari. Mr. Agard was granted leave to proceed in forma pauperis in underlying proceedings both in New York State courts (at trial and throughout his state court appeals) and federal courts on his petition for a writ of habes corpus (in the United States District Court for the Eastern District of New York and in the United States Court of Appeals for the Second Circuit). Ms. Van Ness was assigned to represent Mr. Agard throughout these proceedings, most recently by the Second Circuit Court of Appeals pursuant to the Criminal Justice Act, 18 U.S.C. 3006A et seq., and her appointment is continued for purposes of responding to the instant petition for certiorari.

WHEREFORE, respondent respectfully requests that he be granted leave to proceed in forma pauperis in this Court.

Dated: New York, New York
February 5, 1999

ao/pp

Beverly Van Ness

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No. 98-1170

SUPREME COURT OF THE UNITED STATES
October Term, 1998

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

-against-

RAY AGARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

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LEONARD PORTUONDO, Superintendent of Fishkill Correctional Facility,

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October Term 1998
No. 98-1170

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On July 3, 1997, the United States Court of Appeals for the Second Circuit granted respondent's petition for a writ of habeas corpus per 28 U.S.C. §2254; the State's petition for rehearing and suggestion for rehearing in banc was denied on October 23, 1998. Petitioner subsequently filed a petition for writ of certiorari with this Court, which was received by respondent's counsel on January 21, 1999. For the reasons which follow, the petition should be denied.

INTRODUCTION

Petitioner has advanced three arguments in support of its petition, including the contention that the Court of Appeals' decision in this case constituted an improper extension of Griffin v. California, 380 U.S. 609 (1965), as amplified in United States v. Robinson, 485 U.S. 25 (1988). On the contrary, the Second Circuit's analysis, in which the prosecutorial comments at issue are reviewed in context and against the backdrop of the evidence

adduced at trial, is entirely consistent with this Court's opinions. Moreover, petitioner's claim that there is a serious "split of authority" which this Court must resolve is greatly overblown. Indeed, there is no conflict at all among the circuits on the prosecutorial misconduct issue, and petitioner can point to only one state court of last resort which is even arguably at odds with the Second Circuit's opinion herein; when that state court decision is examined, in turn, its reasoning is actually in harmony with the Court of Appeals' decision in this case. As also discussed post, the particular form of error raised on respondent's appeal has arisen in very few cases over the years, and the unlikelihood of its recurrence further undercuts petitioner's claim that it is worthy of this Court's review. Finally, the claim that the Second Circuit's opinion has generated "extensive controversy" across the nation -- the final argument advanced by the State in support of its petition -- is so grossly exaggerated as to be reckless.

Respondent also takes issue with petitioner's "Statement of the Case," in principal part because of its portrayal, as fact, of numerous alleged crimes of which respondent was affirmatively acquitted by the jury. A short Statement of the Case is therefore included in this brief, which also covers the proceedings on appeal in state and federal court.

STATEMENT OF THE CASE

The first evening that Nessa Winder met respondent, they

voluntarily engaged in sexual acts and, as Winder described it, had a "great time." The following weekend they again ended up at respondent's house, where Winder soon fell asleep. Her close friend and roommate, Breda Keegan, was also there, and respondent allegedly became enraged, put a gun to her head and threatened to kill her.[1] Some time later, after more threats which Keegan acknowledged she did not report to the other people who were at respondent's house, Keegan left Winder behind and accepted a lift home from respondent's friend, Adolph Kiah. She concededly went to sleep without calling the police, and Kiah testified that Keegan had made no complaints to him about respondent's conduct on the drive home.

Winder, meanwhile, awoke later that morning, and "hopped up" out of bed. When respondent woke up, she told him she was in a rush because her English boyfriend was coming to New York to visit, and she asked respondent to call a cab for her. Instead, for the next several hours according to her, respondent terrorized her with his gun, beat her and committed eight separate acts of forcible rape, oral sodomy and anal sodomy.[2] Respondent finally called for a taxi to take her home -- she had earlier failed to

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1 Winder had seen the gun, which respondent kept in his closet, the previous weekend.

2 Winder admitted that she scratched respondent's lip with her nails, cutting him, which respondent testified occurred when he put his hands on her shoulders to calm her down after she realized how late it was and remarked "I got to get home. He's [referring to her English friend] going to kill me." Reflexively, in response to the pain the cut caused him, respondent pushed Winder away with the palm of his hand and thereby hit her in the eye.

avail herself of several opportunities to either flee the house or remain in the bathroom, which had a lock -- and she left.

Respondent testified to a far different version of events at trial, and his account was both consistent with the medical evidence and, as to matters of which Kiah had personal knowledge, corroborated by him. Of the 19 counts submitted to the jury, 14 were associated with Winder (including 9 sexual offenses, 1 count of felony assault [no intent to cause injury required] and a charge of second degree weapon's possession [possession with intent to use unlawfully]), and 2 related to Keegan (second degree weapon's possession and menacing); lesser weapons offenses were also submitted.

In her closing remarks, the prosecutor noted that respondent was "the one who had an answer for everything," and "[a] lot of what he told you corroborates what the complaining witnesses told you. The only thing that doesn't is the denials of the crimes. Everything else fits perfectly." Returning to this theme near the end of her summation, the prosecutor argued:

> You know, ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.
>
> [objection overruled]
>
> That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?
>
> [objection overruled]
>
> He's a smart man. I never said he was stupid.... He used everything to his advantage.

When he later unsuccessfully moved for a mistrial based on the prosecutor's summation, defense counsel included "comment[s] on [respondent's] presence at the trial. He has the absolute constitutional right to be here ... It is improper to make comments to the jury that they should not believe him due to his exercise of his constitutional rights to be present at his trial."

The jury deliberated for close to four full days, ultimately acquitting respondent of all charges connected to the two complainants save two: felony assault (later dismissed on repugnancy grounds) and sodomy in the first degree (1 of the 2 anal sodomy counts considered). He was also convicted of "simple" possession of a weapon in the third degree, of which he had admitted his guilt. Although respondent, at age 36, had only one prior conviction on his record (for which he received a sentence of probation in 1983) and an extensive educational and employment history, he was sentenced to close to the maximum authorized term for the sodomy conviction, 10 to 20 years in prison.

Respondent raised several issues on his state court appeal, including prosecutorial misconduct on summation: the remarks cited ante had denied him his right to a fair trial and, specifically, had abridged his constitutional right to be present at trial and confront his accusers. He cited New York State Appellate Division cases in his brief, pre-dating his trial, which had held similar remarks to be error. In response, the State argued simply that the comments had been "fair response" to defense counsel's summation, and that any error had, in any event, been harmless (see

petitioner's Appellate Division brief, pp. 54-56).

The Appellate Division modified the judgment by dismissing one of the third degree weapons' possession counts and otherwise affirmed (199 A.D.2d 401, 606 N.Y.S.2d 239 [2nd Dept. 1993]). After leave to appeal was denied by the New York State Court of Appeals (83 N.Y.2d 868 [1994]), respondent filed a petition for writ of habeas corpus limited to the trial errors he had asserted which were of federal constitutional dimension, including the prosecutorial misconduct issue. In response, the State never contended that respondent was seeking to create a new rule of constitutional dimension, of which it had not been on notice at the time of respondent's trial. On the contrary, it again addressed the claim on the merits, arguing "fair response" and, alternatively, that "the prosecutor's summation comment [sic] did not substantially prejudice defendant and thus does not warrant habeas corpus relief" (see petitioner's District Court brief, pp. 53-56).

The District Court found that the petition raised "difficult" issues requiring "careful attention" (DC 14, 24; Pet. App. at 2a, __ [page 24 of transcript not reproduced by petitioner in its appendix]).[3] Far from finding "overwhelming" evidence of guilt as petitioner had argued (petitioner's District Court brief, pp. 36, 45, 52), it recognized that the only "decision for the jury" was

3 "DC" refers to the transcript of oral argument before the District Court and its decision, dated March 15, 1996; the transcript has been included in petitioner's appendix ("Pet. App.").

credibility and that this was "a close case" (DC 14-15, 22; Pet. App. at 2a, 9a). The challenged comments made by the prosecutor on summation "troubled" the court (DC 21; Pet. App. at 8a), as they were "dangerously close to commenting on the exercise of a [constitutional] right" (DC 22, see DC 23: remarks "close ... to the line"; Pet. App. at 8a, 9a). Upon review of the entire summations, however, the court found insufficient prejudice to warrant habeas relief (DC 22-23; Pet. App. at 8a-9a). It did grant a certificate of probable cause sua sponte, however, because of "the seriousness of the issues" (DC 23; Pet. App. at 9a).

In its decision, the District Court had noted that it "ha[d]n't found much federal law on the [prosecutorial misconduct] point"; "[it had] noticed that state courts split somewhat in their evaluation of this kind of comment," however, and cited ten cases that it had reviewed (DC 20-21; Pet. App. at 6a-7a). On respondent's appeal to the Court of Appeals for the Second Circuit, the State did not address these cases or suggest that respondent's prosecutorial misconduct claim was in any way a trail blazer. Instead, as at every other prior stage of the proceeding, it argued only that the "remark [sic] was fair response to argument raised by [respondent] in his summation. Further, even if this remark [sic] was improper, it did not cause [respondent] substantial prejudice" (petitioner's Court of Appeals' brief, p. 46).

The United States Court of Appeals held that the prosecutor's comments on summation were harmful constitutional error, and

remanded the case to the District Court with directions that the writ of habeas corpus be granted (117 F.3d 696 [2nd Cir. 1997]; Pet. App. at 12a, 54a; see, generally, Pet. App. at 36a-54a, incl. harmless error review). It, too, cited decisions from ten state appeals courts which had addressed the issue (there were no federal decisions), the majority of which supported respondent; of the balance, two were found to be of questionable value analytically (Pet. App. at 38a-39a, incl. fn. 5).

Petitioner filed a petition for rehearing and suggestion for rehearing en banc, which was denied on October 23, 1998 (159 F.3d 98 [2nd Cir. 1998]; see Pet. App. at 70a-71a). On the merits, consistent with its earlier opinion, the panel's majority reiterated that it was improper for the prosecutor to make "a generic argument that a defendant's credibility is less than that of prosecution witnesses solely because he attended the entire trial while they were present only during their own testimony"; this is what was done at respondent's trial, "an outright bolstering of the prosecution witnesses' credibility vis-a-vis the defendant's based solely on the defendant's exercise of a constitutional right to be present during the trial" (Pet. App. at 72a). For future reference, however, the majority clarified that it was "retreat [ing] from any language" in the prior opinion "suggesting" that it would be error for a prosecutor to make fact-based arguments, grounded on the trial evidence, that a defendant had "used his familiarity with the testimony of the prosecution witnesses to tailor his own exculpatory testimony" (id. at 72a-73a).

In its petition for rehearing, the State had also argued, for the very first time, that the specific constitutional objection lodged by respondent's attorney at trial, and the federal constitutional analysis subsequently advanced by his counsel throughout four levels of appellate review, constituted a novel position which should not be applied retroactively to respondent's trial under Teague v. Lane, 489 U.S. 288 (1989). Noting its discretion to not consider such a tardily raised procedural claim, citing, inter alia, this Court's decision in Schiro v. Farley, 510 U.S. 222, 228-29 (1994), the Court of Appeals declined to do so (Pet. App. at 73a-74a); considerations of comity "call[] for representatives of states not to agree to federal courts expending substantial time in addressing the merits of a case, only to argue belatedly that the merits should not have been reached" (Pet. App. at 73a).

ARGUMENT AGAINST GRANTING PETITION

In its effort to generate this Court's interest in this case, petitioner first argues that the Court of Appeals' decision constitutes an improper extension of Griffin v. California, 380 U.S. 609 (1965) (Cert. Pet., pp. 11-14). Petitioner acknowledges, however, that the Second Circuit only used Griffin "by analogy" in its opinion (id. at 12) -- the Court never suggested that Griffin compelled a finding that respondent's Sixth Amendment rights were violated (see Pet. App. at 41a-47a). More importantly, contrary to petitioner's contention (Cert. Pet. at 13-14), the Circuit

Court's analysis is entirely consonant with both Griffin and the "narrow" reading of that case advocated in United States v. Robinson, 485 U.S. 25 (1988). For just as this Court has made clear that comments on the defendant's exercise of his constitutional right to remain silent are not forbidden per se, and may, in fact, be entirely appropriate when viewed in context (in Robinson, such remarks were held to constitute fair response to an argument made by defense counsel), the Court of Appeals in this case made the same point with respect to comments on a defendant's exercise of his constitutional right to be present at trial and confront his accusers: far from "creat[ing]" a rigid "rule" as petitioner claims (Cert. Pet. at 13), the Second Circuit made clear that both the propriety and prejudice of such comments depend upon the particular facts of the case. Indeed, in keeping with this long-standing and unremarkable "principle that prosecutorial comment must be examined in context" (Robinson, supra, 485 U.S. at 33), the Court of Appeals specifically noted that remarks concerning the defendant's ability to tailor his testimony by listening to other witnesses before he takes the stand would be permissible if they had evidentiary support (see Pet. App. at 45a-46a, 72a).

Next, petitioner argues that there is a "split in authority" on the propriety of commenting on a defendant's presence at trial which should be resolved by this Court (Cert. Pet., pp. 14-18). The "split" is not among federal courts, however, but among state courts, the majority of which support the ruling of the Court of Appeals in this case (see Pet. App. at 38a-39a, incl. fn. 5).

Moreover, many of the opinions cited by petitioner contain little or no analysis or have inapposite facts, so the issue has by no means been clearly and cogently joined. Even more significant, the paucity of decisions addressing the claim in any fashion demonstrates how rarely it comes up, further undercutting petitioner's contention that it is worthy of this Court's review. Indeed, petitioner can point to only 10 jurisdictions out of 51 (50 states and the District of Columbia) to have even considered the issue, and almost half of the opinions cited are not even from the highest court of the state involved. And, of the six jurisdictions cited in which the issue has been addressed by the appellate court of last resort, only one reached a result contrary to that of the Court of Appeals in this case -- the Supreme Court of Michigan in 1985 (see People v. Buckey, 378 N.W.2d 432). The analysis in Buckey, moreover, is actually in accord with that of the Second Circuit in respondent's case: although finding no error in the specific remarks made by the prosecutor at Buckey's trial, based upon the facts of that particular case, the court expressly noted that

> [w]e do not suggest that a prosecutor may, in every case, argue that a defendant who testifies has fabricated his testimony merely because he has sat through his trial and heard the evidence. Thus, it cannot be said that every defendant will be faced with a choice between forfeiting one right so that he may exercise another - e.g., being present at trial, but not testifying so as to avoid the risk of prosecutorial comment that he fabricated testimony. When, as here, however, the evidence does support that inference, the argument is perfectly proper comment on cred-

ibility.

Buckey, 378 N.W.2d at 439; compare with Court of Appeals' decisions herein, Pet. App. at 46a-47a; 72a-73a).

Not surprisingly given the flimsiness of its argument, petitioner does not attempt to rest on this line of cases to support its claim that the issue is sufficiently important to warrant Supreme Court attention. Instead, it is constrained to collect cases on an entirely different issue in its certiorari petition: cases addressing comments on a defendant's courtroom demeanor (see Cert. Pet., pp. 15-17). Respondent disagrees that that issue "has generated a deep split of authority" (id. at 15), as the holdings of these cases are so fact-specific, but the point is irrelevant and thus not worth debating: the cases petitioner cites, to the extent they contain any meaningful analysis at all, concern whether certain comments on demeanor could be construed as an infringement of the defendant's Fifth Amendment right to remain silent. These cases, in short, have absolutely nothing to do with the issue addressed in respondent's case, nor do the other cases petitioner cites which involve comments which may or may not violate an accused's right to counsel (see Cert. Pet. at 17-18). However interesting these other issues might be as an intellectual matter, this case will not provide a forum to address them, and they accordingly provide no basis on which to grant certiorari.[4]

[4] As for petitioner's related suggestion that this case "presents this Court with an opportunity to adopt a standard for determining the propriety of prosecutorial comment on a defendant's exercise of his constitutional rights" (Cert. Pet., p. 18), it is hard to

Finally, petitioner argues that the Court of Appeals' decision herein has caused "extensive controversy" which "demonstrates the far-reaching national implications of the issue" and thereby "supports granting certiorari" (Cert. Pet. at 18-20). To counsel's knowledge, however, the Court of Appeals' decision on the State's petition for rehearing (which did not modify the majority's prior ruling but rather briefly and simply clarified one point which had already been addressed [see Pet. App. at 72a-73a]), has not been cited once since it was rendered almost four months ago. In fact, petitioner points to only four cases which have cited the Court of Appeals' initial decision in this case, which was published more than 19 months ago; two of those, in turn, are from state courts which had already considered the prosecutorial misconduct issue raised herein before respondent's appeal was decided by the Court of Appeals and had reached the same result (see cases cited in Cert. Pet., pp. 19-20, and compare with list of cases cited in Pet. App. at 38a). The dearth of citations to the Second Circuit's decision herein, which, as previously discussed, concerns a form of prosecutorial misconduct which occurs very infrequently (see pp. 9-10, ante), demonstrates the puffery of petitioner's claim of "extensive controversy," as does the number (four) and content of the other "published com-

imagine what such a "standard" could be short of a bright line rule that either any and all comments on a particular right are permissible or no comments are, ever, under any circumstances -- potential rules which it is highly unlikely this Court would favor and, in fact, inconsistent with the contextual approach used in United States v. Robinson (485 U.S. 25), a case cited by the State in its petition herein (Cert. Pet., pp. 13-14).

mentary" on the case that petitioner cites (Cert. Pet., pp. 19-20): a brief New York Law Journal article reporting the denial of the State's petition for rehearing; a discussion of the case by a law professor in the context of a larger article on tailoring of testimony; a short letter in response to the editor of the Law Journal from a White Plains attorney; and a terse recapitulation of the Second Circuit's holding, without any discussion whatsoever or even comment, in a lengthy Syracuse Law Review article entitled Evidence. There is no question that the Second Circuit's decision was of extreme importance to respondent, who served 8 1/2 years in prison on his minimum sentence of ten years prior to his release, but the issue is decidedly not "of national importance" as petitioner asserts (Cert. Pet. at 18).

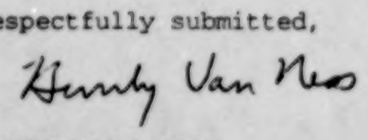
* * *

From the initial briefing of the issue in New York's Appellate Division in 1992 through the habeas proceedings in District Court and then on appeal to the Court of Appeals, petitioner never once took issue with the New York State cases respondent cited, which expressly held that remarks such as made by the prosecutor at respondent's trial were error -- cases which were already on the books before that trial was held. Rather, the State contended only that the prosecutor's comments were fair response to the defense summation and, if error, harmless. Moreover, respondent's trial counsel made the precise constitutional basis of his objections to the prosecutor's summation clear back in 1991, and respondent's appellate lawyer has since used the same federal constitutional analysis on all levels of his state and federal appeals. The State has thus had years, literally, to consider the claim on which respondent's habeas petition was ultimately granted, but it was only after losing in the Court of Appeals, in its petition for rehearing, that the issue's purported novelty was first alleged and the "split of authority" on the point exploited (as noted, the Court of Appeals undertook to review state cases on the issue in its July 1997 opinion, but the District Court had already done this in its decision on the habeas petition, back in March 1996. As a result, petitioner was given prior notice of virtually all the cases in the country which mentioned the issue, but it chose to adhere to its "fair response"/error is harmless themes in its brief to the Court of Appeals). For all the reasons stated, the State's efforts, now, to paint the issue as deserving of this Court's time and resources must fail.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,



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